No. 89-1419

APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HALIFAX HOSPITAL MEDICAL CENTER,
Petitioner,

v.

RICHARD A. BOLT and RICHARD A. BOLT, M.D., P.A.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

DAVID A. DONOHOE, P.C.*
CLINTON R. BATTERTON
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1511
(202) 887-4000

HAROLD C. HUBKA
BLACK, CROTTY, SIMS, HUBKA, BURNETT, BARTLETT & SAMUELS
501 N. Grandview Avenue
Daytona Beach, Florida 32118
(904) 274-4480

Attorneys for Petitioner Halifax Hospital Medical Center

* Counsel of Record

April 20, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THERE IS A CLEAR CONFLICT BETWEEN THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A PUBLIC INSTITUTION'S STATE ACTION IMMUNITY MAY BE ELIMINATED BY AN ASSERTION THAT IT "CONSPIRED" WITH OTHERS	1
II. THE CIRCUIT COURT MADE EVERY HOSPITAL VULNERABLE TO SUIT UNDER THE SHERMAN ACT FOR EVERY PEER REVIEW DECISION ADVERSE TO THE APPLICANT, BY TREATING THE HOSPITAL AND ITS OWN STAFF AS SEPARATE ENTITIES AND THEREFORE CAPABLE OF ACTIONABLE "CONSPIRACY."	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases: Page

Austin v. McNamara, No. CV 88-04268 (C.D. Cal. Feb. 20, 1990) (WESTLAW, District Courts Database) 4

Bolt v. Halifax Hosp. Medical Center, 874 F.2d 755 (11th Cir. 1989) (en banc) 2

Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988) 3

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 1984) 6

Fisher v. City of Berkeley, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986) 4

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) 4

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989) 3

United States Football League v. National Football League, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1116 (1990) 5

Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) 5, 6

Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) 3

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated on rehearing*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) 3

Statutes:

Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (Supp. 1988) 4

Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1988) 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1419

HALIFAX HOSPITAL MEDICAL CENTER,
Petitioner,

v.

RICHARD A. BOLT and RICHARD A. BOLT, M.D., P.A.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THERE IS A CLEAR CONFLICT BETWEEN THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A PUBLIC INSTITUTION'S STATE ACTION IMMUNITY MAY BE ELIMINATED BY AN ASSERTION THAT IT "CONSPIRED" WITH OTHERS.

Respondents attempt to sidestep the clear division among the circuit courts as to whether there is a "conspiracy exception" to the state action doctrine by claiming that the court of appeals below either did not say what it said or that it did not mean what it said.

Respondents begin by "re-interpreting" the lower court's opinion, arguing that the circuit court did not really find a "conspiracy exception" to the state action doctrine. Brief at 5. The court of appeals could not have been any more clear, indeed emphatic, in finding just such an exception:

> While the Florida legislature must have foreseen that HHMC would engage in anticompetitive conduct based on recommendations of the physician's peers, nothing indicates that the legislature should have foreseen the type of anticompetitive conduct alleged in this case. Dr. Bolt has alleged that HHMC not only relied on the peer review committee's recommendations but also *conspired* with that committee to deny his privileges on pretextual grounds.

Petition for Certiorari ("Petition"), Appendix at 27a (emphasis in original). Thus, based entirely upon the allegation that petitioner, Halifax Hospital Medical Center ("Halifax") "conspired" with its own medical staff to deny privileges, in subjective bad faith (on "pretextual grounds," which can scarcely have any other meaning), the court below found that Halifax had no state action immunity.[1]

---

[1] Respondents also advance the amazing claim that petitioner "waived" its argument below. As both the en banc opinion and the panel opinion clearly explain, however, the defendants abandoned only the argument that Florida's peer review scheme provides blanket state action immunity for all of the defendants, regardless of whether they are public entities, including the physicians and the private hospitals. Petition for Certiorari, Appendix at 23a n.22. *That* is the "state action" argument which was waived before the en banc court. *Bolt v. Halifax Hospital Medical Center*, 874 F.2d 755 (11th Cir. 1988) (en banc). As the panel correctly noted, Halifax did not waive the entirely separate argument presented here, that Halifax, as a public entity, has a separate source of state action immunity:

> This argument should be distinguished from the state-action argument abandoned by all of the defendants at oral argument before the en banc court.

Petition, Appendix at 23a n.22.

Having distorted the decision below beyond recognition, the respondents attempt to explain away the circuit conflict by arguing that the circuits which flatly refuse to find a "conspiracy exception" to the state action doctrine may not have done so definitively. This is pure invention. For example, in *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 109 S.Ct. 489 (1988), the plaintiff-developers accused the municipal corporation of conspiring with a rival developer, 841 F.2d at 889, and contended that "allegations that city officials acted . . . as participants in a larger conspiracy . . . would strip the city of its antitrust immunity." *Id.* at 892.[2] The Ninth Circuit squarely rejected this argument. *Id.* No amount of circumlocution can change this. The conflict is unambiguous and inescapable.

In a curious passage, respondents, without saying so, attack the Eleventh Circuit's factual determination that Halifax's conduct *was* foreseen ("[T]he Florida legislature must have foreseen that [Halifax] would engage in anti-competitive conduct based on recommendations of the physician's peers . . . ." Appendix at 27a. Respondents blithely assert, "It seems self-evident that no intent to authorize anticompetitive conduct in the selection of staff physicians can be inferred from this nonspecific but routine grant of power. . . ." Brief at 7. It is, to put it mildly, out of place for respondents, a

---

[2] Respondents are totally silent as to the cases finding such an exception in other circuits, most notably ignoring *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), in which the Fourth Circuit acknowledged, one month before the *Bolt* decision was published, that there was a clear division of authority in the circuits, and that the Fourth Circuit had determined to side with the "conspiracy exception" circuits. *See also Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), and *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated on rehearing*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

second time, to "defend" the lower court's decision by contradicting it.[3]

Respondents attempt to downplay the serious adverse impact of the "conspiracy exception" adopted below by claiming that the Local Government Antitrust Act of 1984 [4] and the Health Care Quality Improvement Act of 1986 [5] will limit the application of the decision. As noted by the American Hospital Association in their amicus brief, the Health Care Quality Improvement Act may not apply to many privileging decisions or stem the tide of antitrust challenges to routine hospital credentialing decisions. After four years, only one district court opinion interpreting that act has been reported. *Austin v. McNamara*, No. CV 88-04268 (C.D. Cal. Feb. 20, 1990) (WESTLAW, District Courts Database).

Nor has the Local Government Antitrust Act of 1984 rendered the state action doctrine obsolete or unneces-

---

[3] Respondents' efforts to buttress their argument by invoking this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (Brief at 9-10), are wide of the mark. In *Goldfarb*, a county bar association's recommended fee schedule was struck down as price fixing because no state authorization existed for this practice, precisely the opposite of the situation here where the action *was* held to be contemplated; but only the alleged bad faith motive was not. While the state bar association, technically a state agency, was found to have "joined" this conspiracy, the Court did not find a "conspiracy exception" to the state action doctrine, which does not apply at all to conduct not authorized by the state. In *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), cited by respondents for the proposition that this Court might recognize a "conspiracy exception" for *private* parties who somehow corrupted local government, Brief at 10, the Court merely found that the Sherman Act did not preempt a local rent control ordinance. Because the city unilaterally imposed the ordinance on protecting landlords, there was no actionable "conspiracy" with state actors at all. If anything, these decisions further demonstrate that this Court has not yet addressed the issue raised in this petition.

[4] 15 U.S.C. § 35 (1988).

[5] 42 U.S.C. §§ 11101-11152 (1988).

sary. That act, which does not apply to numerous suits, like this one, begun before its passage, provides immunity only from treble damages liability, not from injunctive relief, which is often what disappointed staff privilege applicants most desire, and not from attorneys' fees awards, which can be enormous.[6] Moreover, the Act applies to local government officials "acting in an official capacity." [7]

II. THE CIRCUIT COURT MADE EVERY HOSPITAL VULNERABLE TO SUIT UNDER THE SHERMAN ACT FOR EVERY PEER REVIEW DECISION ADVERSE TO THE APPLICANT, BY TREATING THE HOSPITAL AND ITS OWN STAFF AS SEPARATE ENTITIES AND THEREFORE CAPABLE OF ACTIONABLE "CONSPIRACY."

Confronted with the lower court's square rejection of the holding in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) that a hospital cannot conspire with its own staff when the peer review process is undertaken, the Respondents brush the "partial conflict" [8] aside and launch into a curious speculation that "the conflict may well disappear on its own." Brief at 12. The basis for this speculation is anything but clear, for respondents nowhere address the anomaly that results from the lower court's ruling—a hospital required by law to conduct privileging proceedings, required by law to do so through its staff, and prohibited by law from doing so other than through its staff, is nonetheless held to be separate from its staff for con-

---

[6] *See United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1116 (1990).

[7] 15 U.S.C. § 35 (1988).

[8] "Partial conflict," Brief at 12, apparently means that the lower court only disagreed with the central holding of *Weiss*. It is that disagreement we ask this Court to resolve and, so far as we are aware, certiorari is not confined to situations where circuits are in conflict on all issues.

spiracy analysis purposes. As we explained in our Petition, this result runs directly counter to this Court's analysis of intra-enterprise conspiracy in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). See Petition at 15-16.[9]

Rather than address this, respondents refer to cases where physicians control health care plans and, "by analogy," twice make the argument that when one "pierces the formal structure" a hospital is indistinguishable from its staff. Brief at 12-14. From this premise, they reach the astonishing conclusion that a hospital can conspire with persons from whom it is indistinguishable. This is as bad logic as it is, under *Copperweld*, bad law.

From a policy standpoint, respondents argue that the peer review process is already endangered under *Weiss* because the physicians themselves are already subject to antitrust risk. Brief at 14-15.[10] This misses the point. If a hospital is vulnerable to conspiracy charges every time it acts anti-competitively—the denial of privileges being inherently "anti-competitive" from the parochial viewpoint of the rejected physician—then the solution is simple, though horrible. A hospital can easily

---

[9] Respondents somehow manage to discuss intra-enterprise conspiracy without mentioning *Copperweld*, in itself quite an accomplishment.

[10] Halifax has not challenged the portion of the *Weiss* analysis permitting antitrust attack on medical staffs viewed as combinations of physicians because that is not Halifax's issue. *Copperweld* holds that "officers or employees of the same firm do not provide the plurality of acts imperative for a § 1 conspiracy," 467 U.S. at 769, but leaves open the issue of whether corporate employees can conspire among themselves if they are "acting on their own behalf." *Id.* at 770 n.15. Whether this exception exists and, if so, what its contours should be, are interesting issues, but Halifax's petition raises only the question whether a legal entity can "conspire" with the only persons through whom it can act and through whom it must act.

protect itself from such charges by *never* denying privileges, regardless of the commands of state law. This tension between state law and antitrust risk deters the policing of physicians by artificially classifying a hospital's privileging process as "concerted action" and thereby directly and adversely affects the quality of care in public hospitals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. DONOHOE, P.C.*
CLINTON R. BATTERTON
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1511
(202) 887-4000

HAROLD C. HUBKA
BLACK, CROTTY, SIMS, HUBKA, BURNETT, BARTLETT & SAMUELS
501 N. Grandview Avenue
Daytona Beach, Florida 32118
(904) 274-4480

Attorneys for Petitioner Halifax Hospital Medical Center

* Counsel of Record

April 20, 1990